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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMES PATRICK ADAMSON, Defendant and Appellant.	G042000 (Super. Ct. No. 08WF2620) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Sarah A. Stockwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., Angela Borzachillo and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant James Patrick Adamson of residential burglary (Pen. Code, §§ 459, 460; subd. (a)) and the court sentenced him to the middle term of four years in prison. Defendant contends the court committed reversible error by admitting into evidence his prior guilty plea and failing to give, sua sponte, instructions on unanimity and flight. He also argues the prosecutor committed error under *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106] (*Griffin*) during closing argument. Finding no error, we affirm.

FACTS

Late one night, Robert McWilliams heard a noise and left his bedroom to investigate. He smelled alcohol and a strong pungent body odor as he walked through the house. The door from the house to the attached garage was ajar and he could see the garage light was on. Upon entering the garage, he saw the interior lights of his car were on and the contents of its center console strewn about the front seats, which was not how he had left it three hours earlier. The garage door leading to the side yard was wide open.

McWilliams called the police and when they arrived he saw a bicycle not belonging to him or his son in his driveway. He also noticed his seven-foot-tall side gate was open and that the bolt normally securing it had been removed and was lying on the ground. He discovered loose bills and change missing from his car, shirts missing from the washing machine, and that a candlestick holder had been moved from the living room mantle into the garage.

A police officer discovered feces smeared on the garage floor, along with discarded soiled clothes. He also found a garbage can pushed up against the backyard gate with a shoe print on the lid. A fingerprint examiner matched fingerprints on compact disc cases inside McWilliams's car to defendant. McWilliams did not know defendant and had not given him permission to be in his house, garage, or car.

When asked about his prints being found in McWilliams's house, defendant responded, "well, if you've got my prints, what do you want me to tell you?" Defendant also said he did not remember defecating in McWilliams's garage or moving a candlestick holder from the house into the garage. He stated "he had been drinking a lot, and was unaware of what he was doing."

DISCUSSION

1. Admission of Evidence of Guilty Plea

Defendant asserts the court erred in admitting his 2006 guilty plea conviction for burglary into evidence because they were not sufficiently similar. We disagree.

In the 2006 case, defendant broke into a post office at night by smashing a window and took some loose change and food. Police identified him through his fingerprints left at the scene and defendant admitted to a witness that he committed the crime. The court found the prior burglary admissible under Evidence Code section 1101, subdivision (b) to show defendant's intent, given the factual "similarities of fingerprints left at both scenes, . . . loose change was taken in both, and both, apparently, occurred in nighttime hours."

Although Evidence Code section 1101, subdivision (a) prohibits the admission of evidence of other crimes to prove propensity or bad character, subdivision (b) of that section allows this evidence when relevant to prove some fact such as intent. We review the court's evidentiary rulings for an abuse of discretion. (*People v. Carter* (2005) 36 Cal.4th 1114, 1149.) "'The least degree of similarity is required to establish relevance on the issue of intent. [Citation.] For this purpose, the uncharged crimes need only be "sufficiently similar [to the charged offense] to support the inference that the

defendant '"probably harbored the same intent in each instance." [Citations.]"' [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 636-637.)

Here, sufficient similarities exist between the 2006 offense and the current one to show defendant had the same intent in both. In both, defendant entered a building at night, took loose change, and left his fingerprints. (See *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1049 [evidence of prior robberies admissible to prove intent where in both cases the defendant entered female victim's car and asked about money]; see also *People v. Denis* (1990) 224 Cal.App.3d 563, 568 [evidence of prior robberies admissible where they occurred at same location and against same types of victims].)

Defendant argues "the present crime was relatively simple, requiring no planning, whereas the prior crime required planning and tools in order to complete." According to defendant, "the possession of an item to smash a window indicates planning and premeditation, whereas there was no forced entry into McWilliams's home." But this ignores the evidence of the garbage can placed against McWilliams's seven-foot tall side gate, from which a jury could reasonably determine was part of his planning and premeditation to gain access to the side yard and enter though the garage. As for forced entry, no windows may have been broken in the present case but nonetheless McWilliams never gave defendant permission to enter his garage or home.

Defendant maintains the court abused its discretion by using the wrong standard to admit the evidence. Citing the court's comment that because the evidence "is only coming in for intent to steal, not a large quantum of similarity is required to be admissible," he claims "[t]he court did not consider how probative the evidence was and did not consider the planning and premeditation involved in the prior offense as opposed to the present offense's apparent spontaneity." On the contrary, the court addressed the probative value of the evidence, stating "it is hard to say that [Evidence Code section] 352 would exclude" the evidence because it "bears heavily on whether [defendant] entered the residence intending to steal or for some other reason, or for no reason at all."

The record also shows the court considered the dissimilarities but nevertheless concluded the two cases were sufficiently similar to raise a reasonable inference defendant entered McWilliams's residence with the intent to steal and that the prior conviction could be admitted for that purpose. Defendant has not shown the court abused its discretion in doing so.

Moreover, the court's instructions to the jury on the limited use of the prior conviction evidence eliminated any danger "of confusing the issues[] or of misleading the jury." (Evid. Code, § 352.) We presume the jury "followed these instructions." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107.)

2. Failure to Give Unanimity Instruction

Defendant contends the court erred in failing to give, sua sponte, a unanimity instruction to the jury because there was evidence of two entries, one into the garage and the other into the house, either of which could support a burglary conviction if "coupled with the required specific intent to commit theft . . . ." The contention lacks merit.

A defendant's constitutional right to a unanimous jury verdict on a specific charge requires that when a conviction on a single charge could be based on evidence of two or more discrete criminal acts, all jurors must agree the defendant committed the same act. Unless the prosecution elects to rely upon a single criminal act, the trial court has a sua sponte duty to instruct the jury it must unanimously agree beyond a reasonable doubt that the defendant committed the same specific act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; CALCRIM No. 3500.)

"The crime of burglary provides a good illustration of the difference between discrete crimes, which require a unanimity instruction, and theories of the case, which do not. Burglary requires an entry with a specified intent. [Citation.] If the evidence showed two different entries with burglarious intent, for example, one of a

house on Elm Street on Tuesday and another of a house on Maple Street on Wednesday, the jury would have to unanimously find the defendant guilty of at least one of those acts. If, however, the evidence showed a single entry, but possible uncertainty as to the exact burglarious intent, that uncertainty would involve only the theory of the case and not require the unanimity instruction. [Citation.]" (*People v. Russo, supra,* 25 Cal.4th at pp. 1132-1133.)

"The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed [the defendant] guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*People v. Russo*, *supra*, 25 Cal.4th at pp. 1134-1135.)

Here, unlike the burglary example in *Russo* with separate entries of different houses on different days, defendant was charged with one count of residential burglary of a single residence. The evidence shows that residence had an attached garage and "courts have consistently determined an attached garage is part of an inhabited dwelling house for purposes of [burglary]." (*People v. Fox* (1997) 58 Cal.App.4th 1041, 1046.) The jury was so instructed. Thus, as the Attorney General notes, "if [defendant] entered into the garage, that was an unlawful entry into McWilliams'[s] home . . . ." Defendant agrees he "entered the garage first." Because there was a single entry, any

uncertainty regarding exactly when defendant's burglarious intent arose involved the theory of the case only, making it unnecessary to give an unanimity instruction.

Defendant asserts "[t]he issue is whether [he] had the intent to steal when entering the garage, or if it was formed later after he found expensive items in the garage." But even if, as he claims, some jurors believed he formed the intent to steal before he entered the garage, and others believed that he formed that intent after he entered the garage but before he entered the home, the garage was attached to the home and thus every juror necessarily believed that defendant entered the home with the intent to steal. Accordingly, there is no risk whatsoever that "the jury may [have] divide[d] on two discrete crimes and not agree[d] on any particular crime" (*People v. Russo*, *supra*, 25 Cal.4th at p. 1135), and the court did not err in not giving a unanimity instruction.

3. Failure to Give Flight Instruction

Defendant argues that, because the prosecution relied on evidence he fled from the scene, the trial court had a sua sponte duty to instruct the jury that although flight may show consciousness of guilty, it alone cannot prove guilt. (CALCRIM No. 372.) The Attorney General concedes the court's failure to do so was error but asserts it was harmless given the overwhelming evidence of defendant's guilt. We agree.

McWilliams never gave defendant, whom he did not know, permission to enter his car or garage, yet defendant's fingerprints were found on compact disc cases located inside McWilliams's car, money was missing from the car, and shirts were missing from the washer. Defendant acknowledges "[t]he evidence showed that [he] had entered the garage[and] may have taken a few items . . . . " Although defendant claims he "presented evidence that nothing was taken," the evidence he cites merely shows McWilliams may not have told the responding and investigating officers about the missing money immediately, or about the shirts at all, not that "nothing was taken."

There was also evidence of defendant's intent to steal as shown by the prior plea conviction for burglary, which we have determined was properly admitted, and the use of a garbage can pushed up against McWilliams's gate in order to gain access to his side yard. A jury could reasonably reject defendant's intoxication defense given the planning and dexterity needed to scale the seven-foot-tall locked gate. Sufficient evidence existed such that there was thus no possibility the jury relied on flight as the sole evidence of defendant's guilt and the failure to give a flight instruction was harmless.

4. Griffin Error

Defendant's final contention is that the prosecutor committed *Griffin* error by asking questions only he could answer. We are not persuaded.

Griffin error occurs when the prosecutor offers impermissible comment, inference, or suggestion about a defendant's failure to testify. (*People v. Hughes* (2002) 27 Cal.4th 287, 371-372.) As a result, the prosecutor may not "refer to the absence of evidence that only the defendant's testimony could provide." (*Id*. at p. 372.) *Griffin*'s holding "does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses. [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.) In determining whether *Griffin* error has occurred, the question is whether there is a reasonable likelihood that jurors could have understood the prosecutor's comments to refer to defendant's failure to testify. (*People v. Clair* (1992) 2 Cal.4th 629, 663.) Although a defendant may single out certain comments made by the prosecutor during closing argument in order to demonstrate error, as the reviewing court we "view the statements in the context of the argument as a whole. [Citaiton.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.)

Immediately before the first set of questions cited by defendant, the prosecutor stated: "Now, the defense is also going to say when Mr. McWilliams came in and testified he said, 'you know what, I smell alcohol.' He didn't say that. He said it smelled like a homeless person, it smelled like body odor. I guess possibly smelled like alcohol. [¶] Again, there has to be some sort of proof. When counsel makes her closing argument and puts forth[] this defense, ask yourself these questions and has she provided any answers for you, what explanation does the defense have for *why the defendant was in that garage? Why did he enter that garage in the first place? Where was he before he broke into the garage? What supposedly did he have to drink? How much did he supposedly drink that night?*" (Italics added.)

We are not convinced there is a reasonable likelihood the jurors understood the prosecutor to be improperly commenting upon defendant's failure to testify or referring to the absence of evidence only his testimony could provide. In *Bradford*, the defendant similarly argued the prosecutor committed *Griffin* error by noting the defendant's failure to call any witnesses or produce any evidence pointing to his innocence. The prosecutor mentioned specifically the defendant's failure to present an expert witness and alibi witnesses. *Bradford* rejected the claim of *Griffin* error because the prosecutor's comments on the defendant's failure to call witnesses or present evidence "cannot fairly be interpreted as referring to defendant's failure to testify." (*People v. Bradford, supra*, 15 Cal.4th at p. 1339.) It stated, "Neither the general comment directed to the lack of defense evidence or testimony, nor the more particularized comments regarding the possibly bloodstained mat, the coroner's opinion, or the absence of alibi for a particular time period, would have required defendant to take the stand." (*Ibid*.)

Likewise, in *People v. Lancaster* (2007) 41 Cal.4th 50, during closing argument the prosecutor "reminded the jury about the Liquid Plumr bottle found at the scene, and observed: 'It was new, it still had liquid in it, and had the defendant's prints

all over it. There's been no explanation offered as to how they possibly could have been there.'" (*Id*. at p. 84.) The defendant argued the prosecutor's comment constituted *Griffin* error. *Lancaster* rejected the argument, stating, "the prosecutor's statement was a fair comment on the state of the evidence, rather than a comment on defendant's failure to personally provide an alternative explanation. [Citations.]" (*Ibid*.)

The same applies here. Read in context, the questions properly focused the jury on defendant's failure to introduce material evidence to support his defenses of being too intoxicated to remember what he did that evening and that he was not involved in the burglary. (*People v. Bradford, supra*, 15 Cal.4th at p. 1339; see also *People v. Wash* (1993) 6 Cal.4th 215, 262-263; *People v. Lewis* (2004) 117 Cal.App.4th 246, 257.)

This analysis also applies to the next group of questions asked by the prosecutor after the court overruled an objection to defense counsel's objection: "*Where was he supposedly drinking that night? Who was he supposedly drinking with that night*? Where are those witnesses to testify? If that was the defense, . . . don't you think there should be some witnesses in here that should tell you, 'oh, sure, we were drinking that night. We had this much to drink. We were all wasted.' There is no evidence offered from anyone, other than the defendant's own statement, 'Oh, I was drunk.' [¶] Again, that's not credible. He made that statement when he knew he was caught and backed into a corner. He had to come up with something. That prior is very important. He's already done this type of behavior before. [¶] Again, I said it was a commercial building, not a residence, but he already knew going into a building stealing things out of it was wrong. So, now he has been caught yet again, he needs to come up with something. He needs to come up with some excuse. That's why he said that. [¶] Again, *why was he in the garage*? *Why did he steal money from Mr. McWilliams'[s] car? Why did he run away? How did he run away if he was so drunk he didn't know what he was doing? How did he flee the scene that he couldn't be found anywhere in the area?* There will be no logical answers to any of those questions. The fact is the defendant wasn't drunk. They want to

rely on one statement he made to an officer when he had no other choice." (Italics added.)

Contrary to defendant's claim, these statements permissibly commented "'"on the state of the evidence . . . , the failure of the defense to introduce material evidence or call logical witnesses"' [citations]" (*People v. Harrison* (2005) 35 Cal.4th 208, 257) regarding defendant's claimed intoxication on the night of the burglary, which *Griffin* does not prohibit. Defendant has not shown it is reasonably likely the jury understood the remarks to refer to him not testifying. (*People v. Clair*, *supra*, 2 Cal.4th at p. 663.)

Finally, defendant highlights the prosecutor's question about why defendant pushed the garbage can against the gate. Placed in context, the prosecutor stated: "[Defense counsel] also said he was trespassing. Well, based on his actions and the things he did at that house, it doesn't make any sense. *Why did he push the trash cans against the gate, climb onto the trash cans to unlatch the gate, to get in? Was he trying to look at Mr. McWilliams'[s] landscaping?* There is no indication that there was any innocent thing he was going to do. He went into the garage to, in fact, steal, and he did, in fact, steal." (Italics added.)

The prosecutor made these comments in rebuttal to defense counsel's argument that defendant was guilty of trespass only and not burglary. She did not comment on defendant's failure to testify. Because the statements, contextually, were in reference to the evidence, and not to defendant's failure to testify, it is not reasonably likely the jury misconstrued the words in violation of the Constitution. Thus, no *Griffin* error occurred.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.